

Virginia Sur. Ins. Co. v Harway Terrace, Inc.
2009 NY Slip Op 31970(U)
August 20, 2009
Supreme Court, New York County
Docket Number: 110207/06
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: KAREN SMITH
J.S.C.

PART 62

Index Number : 110207/2006

VIRGINIA SURETY INSURANCE

vs

HARWAY TERRACE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached memorandum of law.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8-20-09

KSS
KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
VIRGINIA SURETY INSURANCE COMPANY,

Plaintiff,
-against-

Index no.: 110207/06
Motion seq.: 001
Motion date: 4/30/2009

**DECISION, ORDER
AND JUDGMENT**

HARWAY TERRACE, INC., THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK,
THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT SCHOOL SAFETY
DIVISION and BENDY EUGENE,

Defendants.
-----X

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141BJ).

PRESENT: KAREN S. SMITH, J.S.C.:

The motion for summary judgment made pursuant to CPLR § 3212 by plaintiff Virginia Surety Insurance Company ("Virginia Surety") for an order declaring that it is not obligated to defend or indemnify co-defendant Harway Terrace, Inc. ("Harway Terrace") is hereby denied, and co-defendant Harway Terrace's cross-motion for attorneys fees and summary judgment declaring that plaintiff Virginia Surety may not disclaim an obligation to defend and indemnify Harway Terrace is hereby granted, for the reasons stated more fully below.

This action arises from another action captioned *Bendy Eugene v. The Board of Education of the City of New York, the City of New York, New York City Police Department School Safety Division and Harway Terrace, Inc.*, pending in the Supreme Court of the State of New York, Kings County, under Index No. 7373/06 ("the underlying action"). The underlying action involves a June 2004 incident in which Bendy Eugene, then a high school sophomore, was severely beaten on the fourth floor of an apartment building owned by Harway Terrace. Mr. Eugene lost three teeth and his jaw was broken.

At the time of the incident, Mr. Eugene was a student at John Dewey High School ("John Dewey"), located across the street from Harway Terrace. Mr. Eugene was not a resident of Harway Terrace and nor were his assailants.

In the underlying action, Mr. Eugene alleges among other things that his injuries were caused by Harway Terrace's negligent failure to secure the common areas in the building and by its failure to prevent "intruders, vagrants, and derelicts from roaming, entering and remaining in and about the premises."

Mr. Eugene testified that on June 1, 2004, two men, one of whom gestured to indicate he was holding a gun underneath his shirt, coerced him from the premises of John Dewey to those of Harway Terrace. Mr. Eugene and his assailants followed a Harway Terrace resident into the building and they took the elevator to the fourth floor, where the assailants questioned Mr. Eugene about his relationship to a third party. At some point, one of the two men hit Mr. Eugene with a metal object and he lost consciousness. When Mr. Eugene regained consciousness, he tried to escape the building, only to be detained again by his assailants, who robbed him of five dollars, his compact disc player, and a metro card before finally letting him go. Mr. Eugene made it back to John Dewey, where an ambulance was called to take him to a hospital.

Harway Terrace's contemporaneous knowledge of the incident was limited. Shortly after the incident, a tenant notified a security guard of blood on the floor in the building. The security guard observed the blood and the three teeth on the floor and he called 911. Before the police arrived, two high school girls arrived at Harway and expressed concern for the cousin of one of the girls. The security guard took them to where he had observed the blood, and the girls left in dismay when they found a familiar book bag near the blood. Police arrived on the scene but left when they received a call about Mr. Eugene's location. The police took the young man's teeth, and they did not return to Harway Terrace.

Virginia Surety issued a "commercial lines" policy to Harway Terrace for the premises, effective from May 16, 2004 to May 16, 2005. The notice requirement is located at Section 4.2; it reads:

Duties in the Event of the Occurrence, Offense, Claim or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses;and

- (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

The policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

The site manager for Harway Terrace, whose responsibility it is to give notice of “occurrences” to the insurance company, learned about the incident two weeks later, when a porter complained about having had to clean up the blood. The site manager did not know Mr. Eugene, or the fate of his injuries. The site manager was in the habit of reporting accidents to the insurance broker, but did not in this instance because she did not think that Harway Terrace was exposed to liability because of the criminal nature of the incident. As soon as the site manager received the summons and complaint in the underlying action, she forwarded notice of it to the insurance broker.¹

Virginia Surety argues entitlement to summary judgment pursuant to CPLR § 3212 because Harway Terrace failed to promptly notify it of the occurrence.² Virginia Surety contends that Harway Terrace’s failure to notify them for almost two years subsequent to the attack on Mr. Eugene violated the notice condition in their policy as a matter of law. According to Virginia Surety, it was not reasonable of Harway Terrace to believe that it would not be sued as a result of the attack, since it knew that John Dewey students sometimes snuck onto their premises, and because they did not do a follow-up investigation to find out what exactly happened on the fourth floor of their building on June 1, 2004.

Harway Terrace responds that its delay in notifying was caused by a good faith belief that it had no liability for the assault of Mr. Eugene on its premises. It was, Harway Terrace argues, reasonable to believe that it would not be liable for the intentional criminal acts of a third parties. Moreover, Harway Terrace did not know many of the facts which are supposed to be reported under the notice requirement of the policy, such as the victim’s name, the extent of injuries, and

¹While Virginia Surety argues in its motion papers that the site manager represented, in her memorandum providing notice, that she had no prior knowledge of the incident, it is clear from the manager’s deposition, as well as the memo itself, that she actually stated she had no prior knowledge of Mr. Eugene’s *legal claim*.

²Virginia Surety also notes that Mr. Eugene and the City of New York could have notified them, under the policy, but did not.

what happened. Harway Terrace argues also that the locus of the ambulance pick-up, *i.e.*, off its premises, contributes to reasonableness of its belief.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

CPLR § 3001 provides that “[a] party who has brought a claim for personal injury...may maintain a declaratory judgment action directly against the insurer of such other party.” Likewise, an insurer may maintain a declaratory judgment action against a plaintiff in such an action (*See, e.g., Security Mut. Ins. Co. v. Acker-Fitzsimmons*, 31 NY2d 436 [1972]).

In general, “one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice” (*Unigard Sec. Ins. Co. v. North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]). The Court of Appeals has carved out an exception in the insurance context, where, absent a valid excuse, failure to satisfy the notice requirement contained in many insurance policies vitiates the agreement between insurer and insured, “and the insurer need not show prejudice before it can assert the defense of noncompliance” (*Security Mut. Ins.*, 31 NY2d at 440). The rationale for this limited exception “include the insurer’s need to protect itself from fraud by investigating claims soon after the underlying events; to set reserves; and to take an active, early role in settlement discussions” (*Matter of Brandon [Nationwide Mut. Ins. Co.]*, 97 N.Y.2d 491, 495 [2002]).

Courts and commentators have traced a national shift of authority away from this no-prejudice exception. (*See Prince George’s County v. Local Gov’t Ins. Trust*, 388 Md. 162 [2005] [replacing Maryland’s no-prejudice exception with a prejudice analysis, and noting that only six states, including New York, maintain the exception]; *see also* Eric Mill Holmes, *Holmes’ Appleman on Insurance 2d* § 139.4 [2003] [describing a prejudice analysis as the rule in the “overwhelming majority of states.”]) The rationale for turning to a prejudice analysis is that the no-prejudice rule yields “the severe results of a forfeiture for the insured and a windfall for the

insurer” (*Prince George’s County*, 388 Md. 162 at 186; *see also*, *Aetna Cas. & Sur. Co. v. Murphy*, 206 Conn.409 [1988]; *Cooper v. Gov’t Employees Ins. Co.*, 51 N.J. 86 [1968]).

While New York retains the no-prejudice rule, the Court of Appeals has declined to extend it beyond the context out of which it arose in *Security Mutual*. (*See Matter of Brandon [Nationwide Mut. Ins. Co.]*, 97 N.Y.2d at 498 [declining to extend the no-prejudice rule to the context of late notice of claim]; *Unigard Sec. Ins. Co. v. North Riv. Ins. Co.*, 79 NY2d 576, 584 [declining to extend the no-prejudice rule to the reinsurance context]). In *Security Mutual* cases, courts have also considered whether insurance companies are prejudiced, despite its official exclusion from the analysis (*See, e.g., Paramount Ins. Co. v. Rosedale Gardens*, 293 AD2d 235, 241 [1st Dept. 2002]).

Under the *Security Mutual* framework, “a good-faith belief of liability may excuse or explain a seeming failure to give timely notice” (31 N.Y.2d at 441). *Security Mutual* held that the proper standard for evaluating whether late notice should be excused is whether notice was “given within a reasonable time under all circumstances” (*Id.*). The burden to prove the reasonableness of a delay in giving notice rests with the insured (*Paramount Ins. Co.*, 293 AD2d at 240).

In vitiating the contract in *Security Mutual*, the Court relied on the fact that there was a newspaper article about the underlying occurrence, a fire, and that the article, which mentioned the possible liability of the insured apartment building owners, was in fact brought to the insureds’ attention (31 N.Y.2d at 442). In other cases where courts have vitiated insurance policies based on the insured’s failure to provide timely notice of claim, they have done so in the context of conventional tort accidents, and never where the underlying injury is caused by intentional criminal acts committed by third parties (*See, e.g., Paramount Ins. Co.*, 293 AD2d 235).

In cases involving third party criminal acts, courts have found an insured’s delay until commencement of suit against them reasonable (*See, e.g., Beach Haven Apartments v. Allcity Ins. Co.*, 182 A.D.2d 658 [2nd Dept. 1992] [holding, in a suit against an apartment owner arising from a rape and assault, that the insured’s twenty-two month delay in giving notice to the insurer did not vitiate the policy since it reasonably believed that it was not liable for injuries arising

from third party criminal acts on its premises]; *Nalea Realty Corp. v. Public Serv. Mut. Ins. Co.*, 238 AD2d 252 [1st Dept. 1997] [holding, in an action involving a shooting at an apartment building, that insured's delay was reasonably based upon its belief that it was not responsible for the intentional criminal acts of third parties]. In this context of lawsuits arising from criminal acts committed by third parties, the First Department has declined to vitiate an insurance policy where the delay related not only to underlying occurrence but also to notice of the subsequent lawsuit (*Agoado Realty Corp. v. United Int'l Ins. Co.*, 288 A.D.2d 145 [2001]).

Here, Harway Terrace failed to notify Virginia Surety for twenty-two months after the occurrence of Mr. Eugene's beating. Harway presented the testimony of the site manager to show that it believed it was not exposed to liability since the injuries to Mr. Eugene were not caused by an accident, but by the criminal act of a third party. The testimony of the site manager, moreover, shows that Harway Terrace believed it was only required to provide notice of more conventional accidents, *i.e.*, ones caused primarily by conditions in the building. Like the courts in *Beach Haven*, *Nalea Realty*, and *Agoada Realty*, we find this belief reasonable, and unlike the facts of *Security Mutual*, here there was no intervening action, such as a newspaper announcing the injured party's intention to sue, which could have alerted Harway Terrace to the possibility of a lawsuit against it. Therefore, Harway Terrace delay in providing notice is excused.

Since Harway Terrace's delay in providing notice was caused by a good faith and reasonable misapprehension about their exposure to liability, Virginia Surety's motion for summary judgment declaring that it is not obligated to defend and indemnify Harway Terrace must be denied, and, conversely, Harway Terrace is entitled to summary judgment declaring that Virginia Surety may not disclaim coverage based on delay of notice.

Defendant Harway Terrace, moreover, is "entitled to recover attorneys fees and costs, having been compelled by its insurer "to defend against its attempts to obtain a declaration of its right to disclaim" (*Public Serv. Mut. Ins. Co. v. Jefferson Towers, Inc.* 186 A.D.2d 10, 11 [1st Dept. 1992]).

Accordingly, it is

ORDERED that Virginia Surety's motion for summary judgment declaring that it is not obligated to defend or indemnify defendant Harway Terrace is denied and it is further

ORDERED that Harway Terrace's cross-motion for summary judgment is granted and it is further

ORDERED, ADJUDGED AND DECREED that Virginia Surety may not, based on delay of notice, disclaim an obligation to defend and indemnify Harway Terrace in the action captioned *Bendy Eugene v. The Board of Education of the City of New York, the City of New York, New York City Police Department School Safety Division and Harway Terrace, Inc.*, pending in the Supreme Court of the State of New York, Kings County, under Index No. 7373/06; and it is further

ORDERED that Virginia Surety must pay Harway Terrace's legal fees in defending this declaratory judgment action.

The foregoing constitutes the decision and order of this court.

Dated: August 22, 2009

ENTER:



Hon. Karen S. Smith, J.S.C.